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Hansen, T. (2016). Complementarity in Kenya: An analysis of the Domestic Framework for International Crimes Prosecution. In R. Slye (Ed.), *The Nuremberg Principles in Non-western Societies A Reflection on their Universality, Legitimacy and Application* (pp. 143-165). International Nuremberg Principles Academy.

[Link to publication record in Ulster University Research Portal](#)

Published in:

The Nuremberg Principles in Non-western Societies A Reflection on their Universality, Legitimacy and Application

Publication Status:

Published online: 22/11/2016

Document Version

Author Accepted version

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Complementarity in Kenya?

An analysis of the Domestic Framework for International Crimes Prosecution

Thomas Obel Hansen

1. Introduction

This Chapter sets out to examine the legal and institutional framework for prosecution of international crimes in Kenya, focusing on whether it provides a credible basis for accountability at the domestic level and corresponds with international standards relating to such accountability processes, including witness protection and victims' rights.

In the context of the International Criminal Court's (ICC) investigation into the 2007/8 post-election violence (PEV), there has been sustained debate about creating a framework for prosecuting international crimes in Kenyan courts. Citing the ICC's complementarity principle, Kenyan leaders have sought to frame this as an alternative to international prosecution of PEV crimes, whereas civil society groups, citing the same principle, have tended to advocate that a domestic accountability process should only supplement international justice.¹

Kenya ratified the Rome Statute on 15 March 2005 and it entered into force on 1 June 2005. Kenya domesticated the Statute by adopting the International Crimes Act (ICA), which came into force on 1 January 2009.² The ICA provides the foundation for giving effect to the Rome Statute within Kenyan law, including the principle of complementarity, as it gives Kenyan courts jurisdiction to prosecute these crimes; provides the foundation for Kenyan authorities to provide the ICC with requested information, transfer to the Court persons against whom the ICC has issued arrest warrants and otherwise cooperate with the ICC; and lays down provisions permitting the ICC to operate within the country.

Following talks concerning the establishment of a Special Tribunal or a Special Division of the Kenyan High Court to prosecute international crimes committed in the context of the 2007/8 PEV, in January 2015 the Kenyan Judiciary confirmed that it will establish an International and Organized Crimes Division (IOCD) within the High Court. The Judiciary has stated that the IOCD is currently being developed in partnership with stakeholders from other state agencies and international partners under the supervision of a Judicial Service Commission

¹ On civil society attitudes and advocacy relating to the ICC and domestic accountability mechanisms, see Thomas Hansen and Chandra Sriram (2015) and Christine Bjork and Juanita Goebertus (2011).

² International Crimes Act, 2008 (Kenya), ISN No. KEN-2008-L-82568. Available at http://www.kenyalaw.org/Downloads/Acts/The_International_Crimes_Act_2008.pdf.

(JSC) committee. The IOCD is intended to have jurisdiction over international crimes as defined by the Rome Statute, as well as transnational crimes such as organized crime, piracy, terrorism, wildlife crimes, cybercrime, human trafficking, money-laundering and counterfeiting (Wayamo Foundation 2014).

The decision to establish a specialized division of the Kenyan High Court to prosecute international and transnational crimes has been lauded by some as an important step towards promoting accountability and has received substantial international support (Ambach 2015). However, the IOCD is unlikely to prosecute PEV-related crimes, and there are more broadly significant challenges giving effect to the principle of complementarity in Kenya, if understood to involve a framework whereby “the Court and States should work in unison – by complementing each other – in reaching the Statute's overall goal [...] to fight against impunity” for Rome Statute crimes.³

Notable challenges include the lack of investigatory and prosecutorial capacity; challenges relating to the protection of witnesses and victims; and, most profoundly, lack of political will to prosecute the perpetrators of international crimes, particularly those committed in the context of the PEV. However, the debate over creating a domestic framework for prosecuting Rome Statute crimes cannot be separated from developments relating to the Kenyan ICC cases, including steps taken by the Government to end or undermine the ICC process. As all of the PEV-related ICC cases have now collapsed,⁴ supporters have lost leverage for promoting domestic PEV prosecutions.

2. The principle of complementarity and its application to the Kenyan situation

The principle of complementarity, whereby national courts are given priority in the prosecution of international crimes, has often been pointed to as the cornerstone of the Rome Statute (Benzing 2003; Stahn and El Zeidy 2010). The principle is most clearly articulated in Article 17(1)(a) of the Rome Statute, which provides that the ICC shall determine that a case is inadmissible where the case is being investigated or prosecuted by a state which has jurisdiction over it, unless the state is unwilling or unable genuinely to carry out the investigation or prosecution.

The Appeals Chamber has clarified that Article 17 of the Rome Statute entails a two-stage test,

³ ICC, *Prosecutor v. Saif Al-Islam Gaddafi*, ICC-01/11-01/11-547-Anx 2, Dissenting Opinion of Judge Anita Ušacka, Judgment on the Appeal of Libya against the Decision of Pre-Trial Chamber I of 31 May 2013, “Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi”, May 21, 2014, at para 57.

⁴ The last case against William Ruto and Joshua Sang was terminated in April 2016. ICC, *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-2027-Red-Corr., Trial Chamber V(a), Public Redacted Version of Decision on Defence Applications for Judgments of Acquittal, June 16, 2016.

whereby it must first be determined whether national proceedings exist relating to the same suspects and “substantially the same conduct” as investigated by the ICC, before turning to an examination of a state’s potential unwillingness or inability to prosecute the crimes.⁵

It was on the basis of this test that the Pre-Trial Chamber II and later the Appeals Chamber rejected an admissibility challenge filed by the Government of Kenya (GoK) on March 31, 2011, holding that there was a situation of investigatory and prosecutorial inactivity in Kenya.⁶ Although the GoK accepted that national investigations must involve the same overall conduct (in this case the PEV) which is being investigated by the ICC, it claimed that a case is inadmissible as long as this conduct is attributed to “persons at the same level in the hierarchy being investigated by the ICC”.⁷ The Appeals Chamber rejected these submissions, noting that, for a case to be inadmissible under Article 17(1)(a) of the Rome Statute in connection with an application filed under Article 19 with respect to ongoing ICC cases, “the national investigation must cover the same individual and substantially the same conduct as alleged in the proceedings before the Court”, which the Chamber found not to be the case in Kenya.⁸

The GoK also made reference to ongoing judicial reforms, which it was argued meant that investigations of PEV crimes would soon progress, and promised “progress reports” to the Court. However, while Pre-Trial Chamber II “welcome[d] the express will of the Government of Kenya to investigate the case *sub judice*, as well as its prior and proposed undertakings”, it made clear that for an admissibility challenge to succeed, investigations at the national level must be *ongoing*, as opposed to citing a potential future investigation, and stated that “concrete evidence of such steps” must be provided to the Court at the time of filing the admissibility challenge.⁹ The Appeals Chamber agreed with these findings, noting that:

“To discharge that burden, the State must provide the Court with evidence of a sufficient degree of specificity and probative value that demonstrates that it is indeed

⁵ See ICC, *Prosecutor v Muthaura et al.*, ICC-01/09-02/11-274, Judgment on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute”, August 30, 2011 (hereinafter “Muthaura Admissibility Appeal”), at para 39; ICC, *Prosecutor v. Ruto et al.*, ICC-01/09-01/11-307, Appeals Chamber, Judgment on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute”, August 30, 2011 (hereinafter “Ruto Admissibility Appeal”), at para 40. For a critique of the Court’s practice, see Kevin Heller (2016).

⁶ ICC, *The Prosecutor v. Ruto et al.*, ICC-01/09-01/11-19, Application on Behalf of the Government of The Republic of Kenya Pursuant to Article 19 of the ICC Statute, March 31, 2011.

⁷ *Ibid.*, para 32.

⁸ Muthaura Admissibility Appeal, at para 39; Ruto Admissibility Appeal, at para 40.

⁹ ICC, *Prosecutor v. Muthaura et al.*, ICC-01/09-02/11-96, Pre-Trial Chamber II, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, May 30, 2011, at paras 41, 59-60; *Prosecutor v. Ruto et al.*, ICC-01/09-01/11-101, Pre-Trial Chamber II, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, at paras 45, 63-64.

investigating the case. It is not sufficient merely to assert that investigations are ongoing”.¹⁰

Accordingly, the GoK did not succeed in challenging the admissibility of the ICC cases with reference to national proceedings. As will be explained below, the admissibility challenge must be viewed in the context of a broader campaign aimed at ending or undermining the ICC cases which must be taken into account in order to understand the challenges related to giving effect to the principle of complementarity in the country.

3. Kenya’s domestication of the Rome Statute

Kenya ratified the Rome Statute on March 15, 2005, and the Statute entered into force for Kenya on June 1, 2005. On January 1, 2009 the Statute was domesticated with the passage of the ICA. Kenya has a monist legal system, so the Rome Statute itself also currently forms part of Kenyan law.¹¹ Because the substantive law of the Rome Statute forms part of Kenyan law irrespective of the ICA, the ICA’s main function in the current constitutional order is to create procedures making possible the prosecution of Rome Statute crimes in Kenyan courts, and to provide a legal basis for national authorities’ cooperation with organs of the ICC.

3.1 ICA Crimes

Article 6(4) of the ICA stipulates:

“‘Crime against humanity’ has the meaning ascribed to it in Article 7 of the Rome Statute and includes an act defined as a crime against humanity in conventional international law or customary international law that is not otherwise dealt with in the Rome Statute or in this Act [emphasis added]

‘Genocide’ has the meaning ascribed to it in Article 6 of the Rome statute

‘War crime’ has the meaning ascribed to it in Article 8(2) of the Rome Statute”.

The ICA’s reference to customary international law means that the Act provides for a broader definition of crimes against humanity compared to the Rome Statute, as the existence of a state or organizational policy – as mentioned in Article 7(2)(a) of the Rome Statute – is not a requirement under customary international law (Hansen 2011a).

The ICA also criminalizes offences against the administration of justice, including corrupting

¹⁰ Muthaura Admissibility Appeal, at para 61; Ruto Admissibility Appeal, at para 62.

¹¹ However, this is only the case since 2010 with the adoption of a new Constitution. Article 2(5) of the 2010 Constitution states that “the general rules of international law shall form part of the law of Kenya”, and Article 2(6) that “any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution”.

ICC officials, giving false testimony or fabricating evidence in ICC cases, intimidating ICC witnesses, and in other ways obstructing justice at the ICC (Articles 9-17), and gives Kenyan court's jurisdiction to try these crimes (Article 18).

3.2 Criminal liability and procedures for prosecuting Rome Statute crimes in Kenyan courts

Article 7(1) of the ICA specifies that, for the purposes of national proceedings concerning the Rome Statute crimes spelled out in Article 6 of the ICA, Article 25 of the Rome Statute relating to principles of individual criminal responsibility (modes of liability) and Article 28 relating to the responsibility of commanders and other superiors “shall apply, with any necessary modifications”.

It is not clear what these “necessary modifications” could refer to, since Article 7(2) of the ICA states that the modes of liability and other general principles under Kenyan criminal law are only applicable in the context of ICA proceedings to the extent they are not inconsistent with the Rome Statute rules mentioned in Article 7(1) of the ICA, including the rules relating to criminal liability under Article 25 and 28 of the Rome Statute.¹²

Other than the specific provisions of the Rome Statute outlined in Article 7(1) of the ICA relating to criminal liability, principles of interpretation to be applied to the definition of crimes, the required mental elements to the crimes, and a limited number of other rules, Article 7(2) of the ICA states that the rules and principles of Kenyan criminal procedure otherwise apply to proceedings relating to ICA crimes.

Article 8 of the ICA gives the Kenyan High Court jurisdiction to try the crimes under the ICA.¹³

3.3 Witness protection

The ICA does not include a detailed scheme for witness protection. However, the ICA entails a number of provisions relevant to the protection of witnesses in ICC cases. Article 105(1) and (2) of the ICA, which concerns ICC requests for Kenyan authorities to provide assistance under

¹² Article 7(2) provides that for the purposes of ICA proceedings, the provisions of Kenyan law and the principles of criminal law applicable to the offence under Kenyan law shall apply and a person charged with the offence may rely on any justification, excuse, or defence available under the laws of Kenya or under international law, provided that in the event of any inconsistency between the provisions of the Rome Statute and the provisions and principles in Kenyan law, the provisions specified in the Rome Statute shall prevail.

¹³ The jurisdiction extends to situations where (a) the act or omission constituting the offence is alleged to have been committed in Kenya; or (b) at the time the offence is alleged to have been committed—

(i) the person was a Kenyan citizen or was employed by the Government of Kenya in a civilian or military capacity; (ii) the person was a citizen of a state that was engaged in an armed conflict against Kenya, or was employed in a civilian or military capacity by such a state; (iii) the victim of the alleged offence was a Kenyan citizen; or (iv) the victim of the alleged offence was a citizen of a state that was allied with Kenya in an armed conflict; or (c) the person is, after commission of the offence, present in Kenya.

Article 93(1)(j) of the Rome Statute for the protection of victims and witnesses involved in ICC proceedings, provides that the Attorney-General (AG) shall give authority for such request to proceed if satisfied that the request relates to an investigation being conducted by the ICC Prosecutor or any proceedings before the ICC, and the assistance sought is not prohibited by Kenyan law.¹⁴ Article 16 provides that a person who unlawfully takes action to compel another person to abstain from doing anything that the person has a lawful right to do in relation to any proceedings of the ICC, or causes the person to fear for the safety of themselves or persons they know, is guilty of an offence and liable for imprisonment for up to five years. Article 17(1) further provides that a person who, by act or omission, does any thing against a person or a member of the person's family in retaliation for the person's having given testimony before the ICC, is guilty of an offence and liable for imprisonment for up to five years.¹⁵

The ICA is silent with respect to witnesses in proceedings before Kenyan courts. However, in 2006, Kenya passed the Witness Protection Act – which was as amended in 2010 and again in 2012 – which generally applies to proceedings before Kenyan courts and hence also to potential ICA proceedings.¹⁶ Article 3(1) of the Act defines a witness as “a person who needs protection from a threat or risk which exists on account of his being a crucial witness”, who:

“(a) has given or agreed to give, evidence on behalf of the State in

(i) proceedings for an offence; or

(ii) hearings or proceedings before an authority which is declared by the Minister by Order published in the Gazette to be an authority to which this paragraph applies;

(b) has given or agreed to give evidence, otherwise than as mentioned in paragraph (a), in relation to the commission or possible commission of an offence against a law of Kenya;

(c) has made a statement to—

(i) the Commissioner of Police or a member of the Police Force; or

(ii) a law enforcement agency, in relation to an offence against a law of Kenya;

¹⁴ Article 105(3) further provides that if the Attorney-General gives authority for such requests to proceed he shall take such steps as he thinks appropriate in the particular case and forward the request to the appropriate Kenyan agency and that agency shall, without delay ‘use its best endeavours to give effect to the request’.

¹⁵ Article 17(2) further states that a person who conspires or attempts to commit, or is an accessory after the fact in relation to, or counsels in relation to, an offence under subsection (1) is guilty of an offence and liable on conviction to imprisonment for up to five years.

¹⁶ The Act as amended in 2010 and 2012 is available at <http://www.wpa.go.ke/resources/downloads/34-acts>.

(d) is required to give evidence in a prosecution or inquiry held before a court, commission or tribunal outside Kenya—

- (i) for the purposes of any treaty or agreement to which Kenya is a party; or
- (ii) in circumstances prescribed by regulations made under this Act”.

Article 3(2) further stipulates that a person shall be “a protected person for the purpose of this Act” if that person qualifies for protection:

- (a) by virtue of being related to a witness; or
- (b) on account of a testimony given by a witness; or
- (c) for any other reason which the Director may consider sufficient.

The Act established a Witness Protection Agency (WPA) to provide

“the framework and procedures for giving special protection, on behalf of the State, to persons in possession of important information and who are facing potential risk or intimidation due to their co-operation with prosecution and other law enforcement agencies”.¹⁷

The WPA is tasked with establishing and maintaining a witness protection program; determining the criteria for admission to and removal from that program; determining the type of protection measures to be applied; advising any Government Ministry, department, agency or any other person on the adoption of strategies and measures on witness protection; and performing such other functions as may be necessary for the better carrying out of the purpose of the Act.¹⁸ Article 4(2) stipulates that the witness protection program may provide, among other actions: (a) physical and armed protection; (b) relocation; (c) change of identity; or (d) any other measure necessary to ensure the safety of a protected person. Article 4(3) further provides that the WPA may request the courts to implement protection measures such as: (a) holding *in camera* or closed sessions; (b) the use of pseudonyms; (c) the reduction of identifying information; (d) the use of video link; or (e) employing measures to obscure or distort the identity of the witness. Articles 5 and 6 spell out the criteria and process for inclusion in the witness protection program, and Article 9 allows for temporary protection pending full assessment.

Article 3I(1) of the Act establishes a Victims Compensation Fund which, among other things,

¹⁷ WP Act, Article 3(b)(1).

¹⁸ WP Act, Article 3C(1).

is intended to offer restitution to “a victim, or to the family of a victim of a crime committed by any person during a period when such person is provided protection under this Act”.

Whereas the Act seems to provide a solid framework for the protection of witnesses involved in ICA proceedings, many observers have emphasized observed that witness protection remains a serious challenge in the country. For example, the International Commission of Jurists (Kenya Section) (2010) notes that the bodies set up under the Act lack independence from other government agencies, including the police; that there are no clear provisions for external funding; and that the Act is only applicable to prosecution, not defense, witnesses. With respect to witness protection in potential international crimes cases before Kenyan courts, the lack – or perceived lack – of independence from other government agencies would likely present a serious challenge for witnesses’ willingness to testify and to be enrolled in the witness protection program. The Judicial Service Commission’s (JSC) report of October 2012 on the creation of an international crimes division expressed similar concerns. The JSC noted the inadequacy of the WPA in its state at the time, acknowledged the importance of an effective witness protection agency to the successful prosecution of international and transnational crimes, and recommended that “the government should fully fund and make operational the existing Witness Protection Agency” (Judicial Services Commission 149).¹⁹ Human Rights Watch (2011) has also noted that “the government has allocated only a fraction of the funding requested by the agency, not even enough to cover basic operations” and that:

“in order to address post-election violence within the Kenyan judicial system, funding the Witness Protection Agency is an obvious priority. But many Kenyans question the agency’s ability to adequately protect witnesses at all, given Kenya’s history of attacks on witnesses that are attributed to the very security agencies that in principle should play a role in protecting them”.

3.4 Victims’ rights and participation

The ICA does not include any provisions relating to victim participation in proceedings before the Kenyan High Court in ICA cases, nor does it address the question of how the rights of victims should be addressed by the High Court in such proceedings.

Accordingly, the applicable rules are to be found in Kenya’s Criminal Procedure Code (CPC) as well as the newly enacted Victims Protection Act (VPA).²⁰ The CPC includes a number of

¹⁹ Kenyans for Peace Truth and Justice (KPTJ) notes that the WPA is seriously underfunded. In financial year 2013/2014, it received only Ksh 196 million (\$2.2 million) of the Ksh 500 million (\$6 million) that it requested. KPTJ also notes that “witness protection in Kenya seems to lack the political support necessary to make it effective because it is viewed in the light of the ICC and the efforts to hold high profile politicians accountable” (KPTJ 2014, 10).

²⁰ The Acts are available at <http://www.kenyalaw.org/lex//actview.xql?actid=CAP.%2075> and <http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/VictimProtectionAct17of2014.pdf> respectively.

provisions relating to the rights of victims:

- Article 137(d) lays down a right for victims to be heard with regard to the contents of a possible plea agreement;
- Article 329(C)(1) (cf. Articles 329(D)(1) and 137(I)(1)) allows the Court to request a victim “impact statement” which can be taken into account in sentencing convicted offenders;²¹
- Article 175(2)(b)) allows the Court to order compensation to victims in the context of the criminal proceedings if it is found that “the convicted person has, by virtue of the act constituting the offence, a civil liability to the complainant or another person”;
- Article 177 authorizes the Court to order stolen property restored to the person from whom it was stolen; and
- Article 176 stipulates that in all cases the court may promote reconciliation and encourage and facilitate the settlement in an amicable way of proceedings for common assault, or for any other offence of a personal or private nature not amounting to felony, and not aggravated in degree, on terms of payment of compensation or other terms approved by the court, and may thereupon order the proceedings to be stayed or terminated.

In addition to the CPC, in October 2014 the VPA entered into force. The Act defines a victim as “any natural person who suffers injury, loss or damage as a consequence of an offence”, and provides for a variety of rights for victims. The Act requires relevant authorities to undertake a preliminary assessment of every victim, including in situations of acts of terrorism, internal civil unrest, war or “any other activity that is likely to cause mass victimization” (Article 6(4)). The Act further provides victims, *inter alia*, with the right to:

- Privacy (Article 8);
- Be present at their trial either in person or through a representative of their choice (Article 9(1)(a));
- Have the trial begin and conclude without unreasonable delay (Article 91(1)(b));
- Give their views in any plea bargaining (Article 91(1)(c));
- Have any dispute that can be resolved by the application of law decided in a fair hearing before a competent authority or, where appropriate, another independent and impartial tribunal or body established by law (Article 91(1)(d));
- Be informed in advance of the evidence the prosecution and defense intends to rely on, and to have reasonable access to that evidence (Article 91(1)(e));
- Have the assistance of an interpreter provided by the State where the victim cannot understand the language used at the trial (Article 91(1)(f)); and

²¹ See similarly Article 12(1) of the Victims Protection Act, discussed just below, which elaborates further on this.

- Be informed of the charge which the offender is facing in sufficient details (Article 91(1)(g)).

Using language similar to that found in Article 68(3) of the Rome Statute, Article 9(2) of the VPA states that where the “personal interests of a victim have been affected” the Court shall: “(a) permit the victim’s views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court; and (b) ensure that the victim’s views and concerns are presented in a manner which is not prejudicial to the rights of the accused or inconsistent with a fair and impartial trial”.

Again drawing on the language used in the Rome Statute, Article 9(3) of the VPA provides that the victim’s views and concerns “may be presented by the legal representative acting on their behalf”.

The VPA also guarantees the victim’s right to security, including obliging authorities to place vulnerable victims in a place of safety and provide medical treatment (Articles 10-11); a right and a choice as to whether the victim wants to take part in restorative justice processes, with provisions that should an agreement for restoration or other redress be agreed between the victim and the offender it shall be recorded and enforced as an order of the Court (Article 15); and the right to receive information necessary for the realization by the victim of their rights under the Act (Article 19). Article 23 provides that a victim has a right to restitution or compensation from the offender and the enforcement thereof in accordance with the Act, including for economic loss occasioned by the offence; loss of or damage to property; loss of use of the property; personal injury; costs of any medical or psychological treatment; and costs of necessary transportation and accommodation suffered or incurred as a result of an offence. Article 24 states that the court may award compensation, and such compensation may include financial compensation for expenses incurred as a result of the loss or injury resulting from the offence complained of which shall be charged from a Victim Protection Trust Fund created by the VPA. The Act sets out the mandate of the Trust Fund, including its funding (Article 28); the composition of its Board of Trustees (Article 30); and the Victim Protection Board, which is mandated to “advise the Cabinet Secretary on inter-agency activities aimed at protecting victims of crime and the implementation of preventive, protective and rehabilitative programs for victims of crime” (Article 32).

However, legal experts in Kenya consulted by this author point out that the VPA is not yet fully implemented, is rarely applied by the courts, and that there is little awareness of the Act among relevant stakeholders. In practice, therefore, victims have not yet benefitted from the rights they are entitled to under the Act. While the ICC’s victim participation and reparation regimes face numerous challenges, especially in highly sensitive and politicized cases such as the Kenyan, (Hansen 2016) it is unlikely that they will receive the same level of protection under potential domestic proceedings.

3.5 Is the ICA applicable to PEV crimes?

One central issue in terms of giving effect to the principle of complementarity in Kenya is whether the ICA is applicable to PEV crimes. Since the ICA came into force on January 1, 2009, and thus after the PEV crimes were committed in late 2007 and early 2008, the starting point is that the principle of legality, specifically the prohibition of retroactive application of the law, means that the ICA cannot provide the legal basis for prosecuting PEV crimes.

The JSC report observes that while the ICA cannot “apply to the post-election violence crimes, as this would be in conflict with the non-retrospectivity principle enshrined in the Constitution at the domestic level”, the 2010 Constitution “allows for prosecution of conduct that at the time it was committed was criminalised under international law even though the act or omission did not constitute an offence under the National law”. Accordingly, the JSC argues that PEV crimes can be prosecuted in Kenyan courts relying on substantive law of the Rome Statute (JSC (Kenya) 2012, 88-95).

However, even if Article 50(2)(n) of the 2010 Constitution explicitly exempts international crimes from the prohibition on retroactive application of the law, this does not fully solve issues pertaining to prosecuting PEV crimes as international crimes in Kenyan courts. According to the doctrine of strict legality, there must be an applicable written law, passed by Parliament, that makes an act criminal and punishable for it to be punished in national courts. Because the rules in international law are not implemented in national law that applies to events in 2007/8, and because the Rome Statute does not spell out the procedures to be used by a Kenyan court, it seems necessary to amend the ICA so that it applies to the events in 2007/8. Doing so would neither violate the Constitution nor international standards, since international human rights law exempts international crimes from the ban of retroactive application of the law (KPTJ 2014, 20-23).

4. Proposals to set up a domestic mechanism to prosecute international crimes

4.1 Overview of the Debate about a Domestic Accountability Mechanism to Prosecute PEV and other International Crimes

Following the 2007/8 PEV, a Commission of Inquiry on Post-Election Violence (CIPEV) was created to investigate the PEV and to make recommendations on how to address the crimes. CIPEV recommended that a Special Tribunal for Kenya, composed of Kenyan and international judges, be established to try those most responsible. The Commission also handed over to Kofi Annan, who had chaired the group of mediators involved with resolving the crisis, a sealed envelope with the names of those it deemed most responsible, which was to be forwarded to the ICC if the GoK failed to act on the recommendation. The tribunal was not created, the envelope was handed over to the ICC Prosecutor, and on March 31, 2010 the ICC

formally announced the opening of an investigation into the Kenyan situation (Sriram and Brown 2012; Hansen 2011b).

Since then, numerous attempts have been made to create a platform for prosecuting PEV (and other international crimes) within the Kenyan legal system. However, as is evident from the following outline, these attempts have been half-hearted and many seemingly aimed at using the complementarity principle to bring to an end the ICC process:

In December 2008, then President Mwai Kibaki and Prime Minister Raila Odinga signed an agreement stipulating that a Cabinet Committee would draft a bill on the Special Tribunal.²² In February 2009, the Constitution of Kenya Amendment Bill 2009, drafted by then Justice Minister Martha Karua, proposed to create a Special Tribunal, but was voted down in Parliament, with many parliamentarians arguing that accountability for the PEV should instead be pursued by the ICC (Human Rights Watch 2009; Warigi 2009). In July 2009, the Cabinet, citing its decision to establish a Truth, Justice and Reconciliation Commission (TJRC) to “deal with PEV perpetrators”, refused to table in Parliament a second bill on a Special Tribunal, drafted by then Justice Minister Mutula Kilonzo with input from civil society.²³ In November 2009, in another attempt to enact the Special Tribunal, a revised Constitutional Amendment Bill was tabled but not passed because quorum was not met in Parliament (only 18 out of 222 parliamentarians were present) (Human Rights Watch 2011).

In December 2010, immediately after then-ICC Prosecutor Moreno-Ocampo announced the names of the six Kenyans he intended to prosecute for their alleged involvement in the PEV, Kibaki stated that “the government is fully committed to the establishment of a local Tribunal to deal with those behind the PEV, in accordance with stipulations of the new Constitution”,²⁴ and soon thereafter the GoK announced that a Special Division of the High Court would be established to try PEV cases, but no concrete action was taken to this effect (Namunane 2011). During the early months of 2011, in the run-up to the ICC suspects’ first appearance in The Hague in April 2011, several Kenyan politicians again proposed that a local accountability mechanism should be created, making reference to the principle of complementarity when stating that the purpose of doing so should be to “bring the [ICC] cases home” (Leftie 2011). In early 2012, following the ICC confirmation of charges decision, the GoK again stated its intention to “bring the cases home”, simultaneously arguing that the ICC suspects should be prosecuted in national courts, the East African Court of Justice (EACJ), or the African Court of Justice and Human Rights, notwithstanding that the Rome Statute does not entail provisions

²² Government of Kenya, State House, “Special Tribunal to Be Set Up”, December 17, 2008, available at <http://www.statehousekenya.go.ke/news/dec08/2008171202.htm>.

²³ Government of Kenya, Office of Public Communications, *Cabinet Decides on TJRC*, July 30, 2011, available at <http://www.communication.go.ke/media.asp?id=940>.

²⁴ Republic of Kenya, Office of Public Communications, *Statement by His Excellency the President Hon Mwai Kibaki*, December 15, 2011, available at <http://www.communication.go.ke/media.asp?id=1246>.

for “transferring” cases to a potential regional criminal court and the government’s admissibility challenge had already been rejected by the Court (Hansen 2012). In May 2012 the JSC set up a working committee to study and make recommendations on the viability of establishing an International Crimes Division (ICD) in the High Court of Kenya and delivered its first report on the topic in October 2012 (JSC (Kenya) 2012).

In November 2013, Kenya's Chief Justice, Willy Mutunga, stated the ICD would soon become operational (Obara 2012), and in February 2014, a meeting held in Naivasha, involving members of Kenya’s judiciary and other legal sector bodies as well as civil society groups, adopted a resolution on the formation of the ICD, noting that the ICD should have jurisdiction to address PEV crimes (CapitalFM 2014). In January 2015, the Kenyan Judiciary confirmed that it would establish an International and Organized Crimes Division (IOCD) within its High Court in the first quarter of 2015 (Wayamo Foundation 2014), and in April 2015 that the IOCD would be established before the end of 2015, (Ambach 2015, 5-6) but as of July 2016 the IOCD is yet to become operational.

The continued reference to “bringing the ICC cases home”, coupled with the absence of concrete action, gives weight to Susanne Mueller’s conclusion that the overall goal of Kenyan decisions-makers has been to “use as many delaying tactics as possible to ensure that no one would ever be held accountable for the PEV”, and that a domestic accountability mechanism has been viewed as one such tactic (Mueller 2014).

4.2 Actual investigation and prosecution of international crimes within the ordinary court system to date

To date, very few PEV crimes have been prosecuted in the Kenyan courts, and the Director of Public Prosecution (DPP) has stated that no further cases will be brought as they are reportedly not prosecutable. The following provides a brief outline of the investigation and prosecution of PEV cases in Kenya as well as statements made with regard to them.

In 2008, then-Minister of Internal Security, George Saitoti, drew up a list of PEV cases to be handled urgently, ordered the police to speed up investigations and prosecutions of remaining cases, and directed the police to rank the cases according to their gravity so that suspects of the most serious crimes could be charged quickly (Mukinda 2008; Human Rights Watch 2011). Shortly thereafter, the AG instructed the DPP to appoint a team of State Counsel to identify all PEV cases filed (Human Rights Watch 2011). In March, 2011, Police Spokesperson Eric Kiraithe said that PEV files had been prepared implicating up to 6,000 individuals, and that the police were awaiting the establishment of a Special Tribunal or a Special Division of the High Court to see these cases prosecuted (Mukinda 2008). The police also stated that it had opened files and had been questioning the Kenyan ICC suspects in connection with their alleged involvement in the PEV (Mathienge 2011).

In a March 2011 progress report, forwarded to the ICC in connection with the admissibility

challenge, the DPP stated that almost 3,400 PEV cases were “pending under investigation”, and further claimed that there had been 94 convictions for PEV related crimes.²⁵ However, after examining these cases, Human Rights Watch found that “[t]he actual number of known PEV convictions is significantly lower than the report indicated”, concluding that of the 47 PEV-related cases that had actually reached the courts, only eight had resulted in convictions and none of them involved police officers, politicians, government officials or other senior figures alleged to have financed, planned and incited the violence (Human Rights Watch 2009, 29-42; 45-46).

In February 2012, the multi-agency taskforce established by the DPP to review PEV cases and make recommendations to the DPP on how to deal with them, became operational (KPTJ 2013a). Following a series of statements that the PEV cases would prove difficult to prosecute due to lack of evidence (Maliti 2012), in February 2014 the DPP made it clear that no further PEV cases would be prosecuted before Kenyan courts, noting that “[t]he sad and painful truth... is that at present there are no cases arising out of the 2007-08 post-election violence that can be prosecuted before the ICD” (Koech 2014). This has since remained the position of the DPP, and in March 2015 President Kenyatta affirmed this approach, stating that no further efforts would be made to pursue accountability for PEV crimes, but that a fund would be established to assist victims of the violence instead (Leftie 2016).

4.3 The IOCD Proposal

In May 2012 the JSC set up a working committee to study and make recommendations on the viability of establishing the IOCD within the High Court of Kenya. The committee issued its report in October 2012, which forms the basis for the current considerations to establish the Division (JSC (Kenya) 2012). The report proposes that the IOCD shall have jurisdiction over the Rome Statute crimes mentioned in Article 6 of the ICA as well as transnational crimes, including drug trafficking, human trafficking, money laundering, cybercrime, terrorism and piracy, and any other international crimes as may be proscribed under any international instrument to which Kenya is a party (JSC (Kenya) 2012, 65-66). As Gondi and Basant (2016) note, the report itself does not explain why transnational crimes are being linked to the core international crimes, and “a case is not being made why these crimes should be handled by the IOCD”. Some organizations have argued that:

“giving the proposed IOCD the mandate to prosecute both categories of crimes also runs the risk of the court being kept busy with the prosecutions of drug traffickers and terror suspects, while never seriously addressing the more politically sensitive cases of

²⁵ Government of Kenya, *A Progress Report to the Hon Attorney General 2011*, March 2011, Annex 3 of *Prosecutor v. Ruto et al.*, ICC-01/09-01/11-64, Filing of Annexes of Materials [sic] to the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute, at pp. 70-72. <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/09-01/11-64> See further Human Rights Watch 2009, pp. 25-27.

post-election violence” (KPTJ 2014, 9).

The Report further observes that the Kenyan Constitution stipulates that the High Court of Kenya has unlimited original jurisdiction on civil and criminal matters, and that Article 8(2) of the ICA provides that the crimes proscribed in the Act shall be tried in the High Court of Kenya.²⁶ It also noted that Article 5 of the Judicial Service Act gives the Chief Justice administrative power to exercise general direction and control over the Judiciary, including establishing special divisions of the courts. The report recommends that the ICD should apply special rules of procedure, practice and evidence in its operations and conduct of trials (KPTJ 2014, 7). More specifically, it proposes that the IOCD should be modeled on the standards of the ICC, with the same rules, practices and procedures being adopted. However, as noted by KPTJ (2014, 8), it is not clear how the ICD can adopt the rules, practices and procedures of the ICC “since the latter’s rules are an amalgam of both common law and civil law traditions while Kenya is a purely common law country”.

In terms of structure, the report recommends that seven judges be appointed to the Division to sit on two panels of three judges (with one extra judge in case of a judge’s unavailability). The report envisages that once the judges have been identified, they should undergo rigorous training in international criminal law and related subjects. The seat of the IOCD will be in Nairobi, but it can also operate by circuit and may sit and conduct proceedings in any other place in Kenya as directed by the Chief Justice (KPTJ 2014, 8).

In terms of prosecutorial set-up, the report recommends that there should be a special prosecution unit established within the office of the DPP to deal exclusively with international crimes. At the same time, however, it recommends that Parliament should enact legislation under Article 157(12) of the Constitution to provide for the appointment of a Special Prosecutor who would work independently of the DPP. As KPTJ argues, “these two recommendations are confusing as they are contradictory” (2014, 7-8). The DPP has recently established a special office to deal with international crime cases, but this office is embedded within its established system and is thus not independent from the DPP, who has made it clear that no additional PEV cases will be prosecuted in Kenya.²⁷

Chief Justice Willy Mutunga has warned politicians and individuals involved in political violence that the IOCD will be used to prosecute them:

“The IOCD is a Kenyan solution to a local problem. Over many years, we have Kenyans

²⁶ However, appeals from the IOCD will be handled within the ordinary system, first by the Court of Appeal and ultimately the Supreme Court. As noted by KPTJ (2013b, 17), “whilst the JSC proposal states that a selected bench within the Court of Appeal will be trained on matters of international criminal law and required to hear appeals from the ICD, it does not adequately develop the procedural logistics for such a bench within the Court of Appeal and is silent on how further appeals would be treated at the Supreme Court”.

²⁷ The website is <http://www.odpp.go.ke/index.php/international-crimes-division.html>.

who, through organized political violence and organized crime, have undermined our society...The IOCD promises to borrow smart and best practices from the world over to try these cases. In a real sense, this is implementing the Constitutional imperative: to domesticate international law in ways that are useful in terms of substantive law” (Lucheli 2015).

The absence of reference to PEV prosecution in Mutunga’s statement indicates that what was initially conceptualized as an accountability mechanism complementary to the ICC has transformed into something different. No one any longer expects the IOCD to prosecute PEV-related crimes, and the Division may well end up focusing on transnational crimes as opposed to Rome Statute crimes. Actors, such as the Wayamo Foundation, which has been intimately involved in the work of creating the IOCD, now admit that the prospects of the 2007/2008 PEV being investigated and prosecuted by the IOCD have “diminished”, while emphasizing the importance of dealing with transnational crimes in Kenya (Ambach 2015, 4).

5. Contextual analysis and conclusions

There are significant challenges to giving effect to the principle of complementarity in Kenya. The GoK has engaged in an anti-ICC campaign, which has contributed to the collapse of the ICC cases arising out of the situation, and more broadly demonstrated a lack of will to advance accountability principles. Both the former administration, established by a power-sharing arrangement following the 2007/8 PEV, and the current administration, headed by Kenyatta who was until recently a suspect before the ICC, have used significant resources in undermining the ICC process and more broadly accountability for the international crimes committed in the context of the election violence in 2007/8.

Notably, the GoK has made various attempts to obtain a UN Security Council (UNSC) deferral of the cases, claiming that criminal accountability for the PEV undermines peace and security in the country. Spearheaded by then-Vice President Musyoka, in early 2011 the GoK launched a diplomatic offensive to convince other countries that the UNSC should defer the ICC cases, efforts which the African Union supported (Rugene 2011).²⁸ Although the GoK made a formal deferral request to the UNSC, this request was never formally considered by the Council.²⁹ However, another request for a deferral made in 2013 was formally voted on, but with seven votes in favor and eight abstaining the request was not approved.³⁰

²⁸ Assembly of the African Union, Decision on the Implementation of the Decisions on the International Criminal Court Doc. EX.CL/639(XVIII), A.U. Doc. Assembly/AU/16, January 30-31, 2011, at para. 6.

²⁹ Letter from Macharia Kamau, Kenya’s Permanent Representative to the U.N. in New York, to the President of the Assembly of State Parties to the Rome Statute, February 28, 2011. <http://news2.onlinenigeria.com/news/general/81922-Kenyas-letter-ICC-President.html>.

³⁰ United Nations Security Council, Security Council Resolution Seeking Deferral of Kenyan Leaders’ Trial Fails to Win Adoption, with 7 Voting in Favour, 8 Abstaining, SC/11176, November 15, 2013. <http://www.un.org/press/en/2013/sc11176.doc.htm>.

The GoK has failed to fully cooperate with the ICC with respect to requests for evidence. The ICC Prosecutor argues that the GoK's failure to provide her Office with requested records "has had a severe adverse impact" on the cases.³¹ Although the Court has not formally sanctioned Kenya thus far,³² in a ruling of December 3, 2014, Trial Chamber V(b) held that "the approach of the Kenyan Government [...] falls short of the standard of good faith cooperation required under Article 93 of the Statute", and considered that "this failure has reached the threshold of non-compliance required under the first part of Article 87(7) of the Statute".³³

Even if no clear link to the GoK has been established, the ICC Prosecutor, civil society organizations and academics have asserted that persons associated with the suspects have bribed, threatened and in some cases killed witnesses, resulting in a significant number of key witnesses being unwilling or unable to testify, and contributing to the collapse of the cases (Journalists for Justice 2016).

The GoK has also on several occasions threatened that the country will withdraw from the Rome Statute, and lobbied other African countries to do the same, seemingly using these threats both to obtain concessions and to express its dissatisfaction with the Court pursuing cases against its president (Kenyatta) and deputy president (Ruto) (AFP 2016).

As evidenced in this Chapter, the Government has also sought to end the ICC cases citing the principle of complementarity, thus highlighting how this principle can be used by states that aim at undermining, rather than promoting, accountability. Although the ICC rejected Kenya's admissibility challenge, continued debate about establishing a domestic framework for international crimes prosecution has been largely driven by a desire among decision-makers to undermine or discredit the ICC process. Now that the last ICC cases have collapsed, it seems increasingly unlikely that the IOCD, if ever established, will be used to prosecute international crimes cases.

This brings into question when we should conceptualize domestic accountability mechanisms within a "complementarity" framework. As Sriram and Brown argue, "there is a risk [...] that states seeking to evade ICC scrutiny may use the concept of positive complementarity to delay

³¹ ICC, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the status of the Government of Kenya's cooperation with the Prosecution's investigations in the Kenyatta case, December 4, 2014. <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-04-12-2014>.

³² The Trial Chamber is yet to make a final determination of the matter following the Appeals Chamber's decision to remand it for the Trial Chamber to determine afresh whether Kenya had failed to comply with the cooperation request in a way that had prevented the Court from exercising its functions and powers under the Statute. See ICC, *Prosecutor v. Kenyatta*, ICC-01/09-02/11-1032, Appeals Chamber, Judgement on the Prosecutor's Appeal against Trial Chamber V(B)'s "Decision on Prosecution's Application for a Finding of Non-Compliance under Article 87(7) of the Statute", August 19, 2015.

³³ ICC, *Prosecutor v. Kenyatta*, ICC-01/09-02/11-982, Trial Chamber V(b), Decision on Prosecution's Application for a Finding of Non-Compliance under Article 87(7) of the Statute, December 3, 2014, at para 78. The decision not to refer Kenya to the ASP was based, *inter alia*, on the understanding that in the specific case "a referral might result in further uncertainty and potential delay for the proceedings". Ibid at para 82.

through the creation of sham tribunals” (Sriram and Brown 2012, 230). This Chapter has demonstrated how domestic justice initiatives can be portrayed within a complementarity framework, thereby potentially affording them increased legitimacy and international support, notwithstanding that they are not equipped nor intended to pursue accountability for those who orchestrate international crimes.

As “international crimes divisions” of domestic courts proliferate, often with substantial support from international donors, more engaged research is needed as to what these institutions can actually achieve under different circumstances and how they may impact and correlate with justice processes at the international level. As Kersten argues, in recent years, “there has been something of a ‘complementarity turn’, a subtle but evident shift towards focusing on ‘positive complementarity’ – the ICC’s role and ability to catalyze domestic prosecutions” (Kersten 2016). Yet, more knowledge is needed concerning whether and when the ICC’s complementarity regime actually works to galvanize justice at the domestic level, and how States may harness this regime to undermine, rather than reinforce, the spirit of the Rome Statute.

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